

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 03.07.2013

Pronounced on: 11.07.2013

+ **W.P.(C) 3562/2013, C.M. NO. 6697/2013 (for interim relief),
7357/2013 (for impleadment) & 7358/2013 (for exemption)**

BIRLA ERICSSON OPTICAL LTD. & ANR. Petitioners

Versus

BHARAT BROADBAND NETWORK LTD. Respondent

+ **W.P.(C) 3564/2013, C.M. NO. 6701/2013 (for interim relief),
7355/2013 (for impleadment) & 7356/2013 (for exemption)**

VINDHYA TELELINKS LTD. & ANR. Petitioners

Versus

BHARAT BROADBAND NETWORK LTD. Respondent

Appearance: - Mr. S. Ganesh, Sr. Advocate with Mr. Narendra M. Sharma, Mr. Abhishek Sharma, Mr. Ankur Sood, Mr. J.K. Chaudhary and Ms. Aanchal Yadav, Advocates for petitioners in W.P.(C) 3562/2013.

Mr. Maninder Singh, Sr. Advocate with Mr. Narendra M. Sharma and Mr. Abhishek Sharma, Advocates for petitioners in W.P.(C) 3564/2013.

Mr. Manu Mridul, Advocate for respondents.

Mr. Bishwajit Bhattacharyya, Sr. Advocate with Mr. Chandrachur Bhattacharya, Advocates for intervenors.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S.RAVINDRA BHAT

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1. The petitioners in these proceedings under Article 226 of the Constitution claim to be aggrieved by what they term as the unjustified and arbitrary refusal on the part of Bharat Broadband Network Ltd, the first respondent (hereafter “BBNL”) to accept and consider the tenders submitted online by them, pursuant to the invitation to tender for supply of 24 Fibre Metal Free Optical Fibre Cable with double HDPE Sheath (G.652D) and accessories (“the tendered equipment”). They, consequently, seek appropriate directions to BBNL to process and consider the technical and financial bids submitted by them, on their merits.

2. On behalf of Chairman and Managing Director BBNL, online digitally sealed open tenders, on rupee payment basis, were invited from eligible bidders for Supply of 24 Fibre Metal Free Optical Fibre Cable with double HDPE Sheath (G.652D) and accessories. The summary of requirement was given in the Notice Inviting Tenders (NIT) issued on 03.04.2013, duly published, and in addition, electronically notified in the BBNL’s website <http://www.bbnl.nic.in/upload/uploadfiles/files/DetailTenderDocument24FOFC.pdf> the same day. The tender indicated nine (9) types of equipments (24F Metal free Optical Fibre Cable with double HDPE Sheath (G.652D Fiber); Branch Joint Closures; Straight Joint Closures; Splitters 1:2; Splitters 1:4; Splitters 1:8; Termination Box 24F; FDMS (24F) and Patch Cords 5m with SC-APC connector). For the sake of supply of these equipments to different regions of the

country, separate packages, denoting the region, with specific details of quantities of each equipment required, was also indicated in a tabular form, along with the relative Bid security values. The Packages for each region were notified as follows:

*“ Package A: This package shall comprise of supply in District Headquarter or a location/ locations decided in the districts of **North Western India** comprising of J&K, Haryana, Himachal Pradesh, Punjab, Chandigarh, Rajasthan and Uttrakhand.*

*• Package B: This package shall comprise of supply in District Headquarter or a location/ locations decided in the districts of **Northern India** comprising of Western and parts of Eastern Uttar Pradesh.*

*• Package C: This package shall comprise of supply in District Headquarter or a location/locations decided in the districts of **Central India** comprising of Chhattisgarh, Madhya Pradesh and parts of Eastern Uttar Pradesh.*

*• Package D: This package shall comprise of supply in District Headquarter or a location/locations decided in the districts of **Western India** comprising of Gujarat, Maharashtra and Dadra & Nagar Haveli, Daman & Diu.*

*• Package E: This package shall comprise of supply in District Headquarter or a location/locations decided in the districts of **Southern India** comprising of Karnataka, Andhra Pradesh, Tamil Nadu & Kerala, Lakshadweep and Puducherry.*

*• Package F: This package shall comprise of supply in District Headquarter or a location/locations decided in the districts of **Eastern & North Eastern India** comprising of Bihar Jharkhand, Odisha, West Bengal, Sikkim, Arunachal Pradesh, Assam, Manipur,*

Meghalaya, Mizoram, Nagaland, Tripura, Andaman & Nicobar.”

3. In terms of Clause 2, “**Accessibility of Tender Document**”:

*“The tender document for participating in E-tender shall be available for downloading from **3rd April 2013 at 17:00 Hrs** onwards from <https://www.tcil-india-electronictender.com>. This link can also be visited from the website of BBNL- <http://www.bbnl.nic.in> , by clicking Link “**Procurement →Tender Notices**” on the home page. The Tender document shall not be available for download on or after its submission/ closing date.”*

Clause 4 of the NIT indicated that “As BBNL has decided to use process of e-tendering for inviting this tender, and so the hard copy of the tender will not be available for sale.” Clause 5 of the NIT spelt out the eligibility criteria which bidders had to satisfy, for their tenders to be considered. The NIT further stated as follows:

*“6 **Bid Security**: The bidder shall furnish the Bid Security in one of the following ways.*

*a) Demand Draft/ Banker’s cheque in favour of **BHARAT BROADBAND NETWORK LIMITED** payable at New Delhi and drawn on any scheduled bank.*

*b) Bank Guarantee in the format given in Section-VIII of the tender document in favour of **CMD BBNL, New Delhi** from any scheduled bank, and **valid for 180 days** from the tender opening date.*

*7 **Last Date & Time of Submission of Tender bid: 8th May 2013 by 15:00 Hrs.** In case the date of submission (opening) of bid is declared to be a holiday, the date of submission (opening) of bid will get shifted automatically to next working day at the same scheduled time. Any*

change in bid opening date due to any other unavoidable reason will be intimated to all the bidders separately.

8 Opening of Tender Bids: *At 15:30 Hrs of this tender closing date i.e. 8th May 2013.*

9 Place of opening of Tender bids: *BBNL has adopted e-tendering process which offers a unique facility for 'Public Online Tender Opening Event (TOE)'. BBNL's Tender Opening Officers as well as authorized representatives of bidders can attend the Public Online Tender Opening Event (TOE) from the comfort of their offices. Please refer clause 33 of Section IV-A of Tender document for further instructions. However, authorized representatives of bidders (i.e. Supplier organization), if desire so, can attend the TOE at **BBNL Corporate Office, 3rd Floor, CDOT Campus, Mandi Gaon Road, Chhatarpur, New Delhi – 110030**, where BBNL's Tender Opening Officers would be conducting Public Online Tender Opening Event (TOE).*

10 *The bidder is required to submit the tender document online at the e-tender portal. Tender bids received after due time & date will not be accepted.*

11 *Incomplete, ambiguous, Conditional, digitally unsealed tender bids are liable to be rejected.*

12 *CMD, BBNL reserves the right to accept or reject any or all tender bids without assigning any reason. He is not bound to accept the lowest tender."*

4. It is common ground that the tender document is provided for e-tendering through the portal <https://www.tcil-india-electronictender.com>, through TCIL, (Telecommunications Consultants India Ltd, a Central Government enterprise). Data for

Bids had to be fed through two separate electronic forms, i.e. technical and financial bids. Bidders had to upload a scanned copy, additionally, of the “price schedule” which was part of the electronic financial bid. BBNL had issued clarifications on 30th April, 2013 and 1st May, 2013, in respect of the tender, including clarifications in regard to the eligibility criteria. The Petitioner in W.P.(C) 3564/2013, Vindhya Telelinks, (Vindhya) apparently submitted bids in respect of Packages A, C and E. M/s Birla Ericsson Optical Ltd, writ petitioner in W.P.(C) 3562/2013, submitted bids in respect of Packages B, D and F. Vindhya alleges that despite its having furnished the bid security to the extent of Rs. 14.99 crores, in respect of the three packages which it sought to bid for, when the tender forms were sought to be uploaded, in terms of Clause IV.A.23 between 6th and 8th May, 2013 the TCIL portal, designed for accepting the bids, encountered serious errors and defects. It is alleged that while Vindhya completed Electronic form in respect of technical and financial bidding for Package A, and proceeded to submit its bid for Package C and E, the portal still showed that the bid was being accepted for Package A. Some of the dialog boxes in the portal, for accepting numeral data did not accept fractional digits after decimal and showed error. This led to great confusion, and Vindhya alleges that it repeatedly accessed the helplines indicated in the TCIL website, for support, but to no avail, till 03.00 PM on 08.05.2013. The petitioner somehow completed its financial and technical bids. Vindhya further alleges, importantly that when it sought to upload the price schedule, i.e. the scanned copy of portion of the electronic financial bid, technical errors were displayed

in the TCIL portal; consequently the “Price schedule” part of the financial bid, in scanned copy format, was not accepted in respect of all the three packages, i.e. Packages A, C and E. Similar allegations have been made by Birla Ericsson, as regards the submission of the Price schedule part of the financial bid, (other-wise in electronic format) in scanned format, in respect of two of the Packages which it bid for, i.e. Packages D and F. Birla, however was more successful than Vindhya, in that its Price Schedule, along with the electronic bid, could be submitted by the deadline, i.e. 03.00 PM of 8th May, 2013, in regard to Package B.

5. Both Vindhya and Birla submit that the malfunctioning of the TCIL portal, which prevented their respective bids in regard to Packages A, C, D, E and F, were brought to the notice of BBNL immediately at around 03.00 PM of 8th May, 2013 first telephonically, and later through personal meetings of their representatives with the officials of BBNL. They also submit that like them, other interested parties and bidders had approached BBNL at the same time, with identical complaints. BBNL officials, however, stated that in the absence of the scanned copies of the Price schedule, the bids could not be uploaded, and consequently, were incomplete. The petitioners allege that the meetings were followed up with representations and protests through e-mail communications and representations, followed up with reminders, but unavailingly. In these circumstances, they seek appropriate directions from this Court.

6. The petitioner further argues that on an overall reading of the conditions contained in the forms in electronic form, especially

Clauses IV.A.23, IV.A.24, IV.A.26 together with Clause II.21.3 and II.22.1 clearly revealed that the two were to be entirely in electronic form. Wherever the tender or the form indicates offline submission, it specifically stated so. In this regard, Sh. S. Ganesh, Learned senior counsel highlighted that Clause IV.A.24 categorically stated that offline submission had to be made in regard to the bid security either in the form of bank guarantee or DD along with the original copy of letter of authorization and a DD for Rs. 10,50,000/- in favour of BBNL. If the intention of the respondent was that offline submission of the financial bid in addition to the electronic form was an essential condition of the tender, the document would have stated so explicitly in the same manner as in Clause IV.A.24. Learned counsel further submitted that the tender form condition IV.A.29 itself visualized that in the event of variation between the “main bid” – which was not defined – and the electronic format, the latter was to prevail. In other words, even if there was no “main bid” or the tenderer had alleged a defective main bid, the information or date in it was to be ignored and that contained in the electronic format was to prevail.

7. Learned counsel argued that every stipulation in a tender condition cannot be recorded as essential. Therefore, if an intending contractual party were to bid in terms of the tender document and such bid contained certain insubstantial omissions, the entire tender could not be rejected. In support of such argument, learned counsel relied upon the decision of the Supreme Court reported as *Poddar Steel Corporation v. Ganesh Engineering Works and Ors.* 1991(3) SCC 273. Learned counsel drew attention of the Court that the requirements

in a tender notice have to be classified into two categories, i.e. those which prescribed essential eligibility conditions and others which are merely ancillary or subsidiary to the main object achieved by the condition. Learned counsel also relied, in a similar way, upon other judgments of the Bombay High Court in *Shalby Ltd. v. State of Goa* 2012 (1) Mh. LJ 533 and the Division Bench of this Court in *Kapsch Metro JV v. UOI and Anr.* 2007 (95) DRJ 668.

8. Learned counsel for Vindhya Telelinks Ltd., Sh. Maninder Singh submitted that a joint reading of Clauses II.21.3 and II.22.1 revealed that BBNL itself differentiated between essential and ancillary conditions as it factored in the concept of substantive responsiveness of each bid. He also argued that the tender form in more places than one provided that in the event of any discrepancy or defect between the electronic form and offline submission or the main bid, the contents of the electronic form were to prevail. Thus, BBNL itself never treated the requirements of having to submit a scanned copy of the financial bid – which itself was part of the main form and had been filled by both petitioners – as essential.

9. Learned senior counsel for both the writ petitioners urged that in the facts of the present case, the refusal to accept the bid on the ground that the scanned copy of the financial bid was not uploaded and consequently, the bid was not received amounted, to an untenable argument. It is contended in this regard that the adoption of technology, particularly the decision of the BBNL to accept only electronic bids was a welcome sign. However, that could not have limited or restricted the right of eligible bidders to be duly considered

once they did everything reasonably possible to make the submissions within the time. Learned counsel argued in this regard that the failure of the TCIL website to accept the scanned copies of the financial bid was used unjustifiably as a pretext to not even retrieve the technical and financial bids which was otherwise complete. That the failure was not of the petitioners, according to counsel, stood highlighted by the fact that several other bidders faced similar problems and had like the petitioners, represented to the BBNL. The latter's insensitivity and the stubborn refusal to look into the matter, on the one hand and rejection of the petitioner's reasonable claims to be considered, on the other, was arbitrary.

10. Learned counsel submitted that pursuant to the order made in these petitions, on 12.06.2013, the respondent BBNL was in fact able to retrieve the technical bid from the concerned server. All that remains to be done is to direct the BBNL to likewise have the retrieval in respect of the financial bid so that the petitioner's claims to be considered eligible could be duly processed and the tendering could be looked into and the further steps towards considering the tender bids on merits be proceeded with.

11. The BBNL resists these objections. It is urged that the server error, which the petitioners' claim, was on account of the defect in the portal of TCIL, cannot be attributed to the respondent. It is urged in this regard that whereas Birla Ericsson could successfully upload the scanned part of the financial bid in respect of Package-B, it is rather strange that such process could not be completed in respect of the Packages D & F. For the same reason, Vindhya Telelinks Ltd.'s

allegations about its inability to upload the scanned part of the financial bid are suspect. Learned counsel, during the hearing sought to highlight that no details of the screenshot filed as annexures to these petitions have been furnished and that the nature of errors detailed in both the documents are identical.

12. Dealing with the merits, BBNL urges in its counter affidavit that Clause IV.A.3 merely records the broad outline of online submission. Consequently, the mere submission of the financial bid in its electronic form could not be considered as complete in the absence of due authentication and certification which necessarily had to be uploaded after being scanned. Learned counsel, in response to the effect of Clause IV.A.29 relied upon the following averments in the counter affidavit:

“14. As per clause IV.A.29 of the tender document bidder had to submit both Electronic Form and the main bid. The bidder did not have the choice of not submitting the scanned copy of price schedule in the main bid. The importance of the main bid is evident from the clause IV.A.29 in which it is mentioned that if variation is noted between the information contained in the Electronic-Form and the ‘Main-Bid’, the contents of the Electronic-Form shall prevail. Alternatively, the purchaser reserves the right to consider the highest of the two pieces of information (e.g. price) for the purpose of short-listing, and the lowest of the two pieces of information (e.g. price) for the purpose of payment in case that bidder is an awardee in that tender.....”

13. It is urged that the NIT and tender documents were issued on 03.04.2013 and that having regard to these facts, the petitioners have

been unable to explain why they waited till almost the eleventh hour and tried to upload the scanned copy of the financial statement. In this regard, the relevant logs of the concerned servers produced as Annexure-2 collectively, sourced from the TCIL were relied upon. Learned counsel relied upon the log in respect of Birla Ericsson to say that the financial part of the bid in its electronic format was uploaded just two minutes before the time, i.e. 03.00 PM on 08.05.2013. Likewise, Vindhya Telelinks Ltd. too uploaded the financial part of its bids in the electronic form at 02.35 PM. It was submitted that the petitioners should have taken reasonable measures to ensure that the entire bid – including the scanned copies of the financial bid (which in the submission of BBNL constituted the “main bid”) were filed electronically well within time. He highlighted Clause II.16.1 to say that the potential purchasers/bidders had to submit their bids within the specified date and time, i.e. 03.00 PM on 08.05.2013.

14. It was argued as well as pleaded that the tender form in more places than one specified that other instructions, put in place by the TCIL had to be adhered to. In this respect, learned counsel relied upon Clause 14.A.17 and Clause 14.A.39. These clearly stated that the instructions in the tender form alone were not determinative and that further instructions in the TCIL website had to be complied with. Those instructions clearly mentioned that the scanned copies of the financial bid – referred to as “the main bid” (under Clauses II.14.1 and IV.A.9) were to be signed and scanned copies uploaded. This was as essential as in the case of the bid security (under Clause IV.A.24 as scanned copies would have revealed whether the signed verifications

were in order).

15. Learned counsel submitted that the decision of BBNL to treat the petitioners' position as not having been filed is justified. It was urged that in fact since the scanned copies of financial bids were not uploaded, bids were not even received by BBNL. Only upon the Court's directions on 12.06.2013 that the technical bids were retrieved from the server. As far as the submissions with regard to defects in the TCIL's server were concerned, learned counsel urged that the NIT itself had indicated a training schedule to facilitate smooth access to the TCIL website and its proper use by the potential bidders. The petitioner's representatives, employees and all other bidders had been given instructions and training. In view of these, since the petitioners openly accepted these conditions with open eyes, but did not care to upload the main bid (final part of the electronic bid) in a scanned form within the time, BBNL could not be directed to retrieve the financial bids for further processing. It was submitted that the contention regarding other bidders having faced similar problems, cannot be a ground for this Court to conclude that BBNL was arbitrary. Even though other bidders did complain, none of them have approached the Court which indicates that the BBNL's explanations were satisfactory. As a matter of fact, submitted learned counsel, the inability of the petitioners to upload the scanned copy could be for several reasons, such as a "time-out" in their computers; their not following the instructions in letter and spirit; defective filling up of forms etc.

16. Learned counsel argued that it is not open to a tenderer to pick and choose between one clause or condition and say that he would not

comply with the bid conditions. He relied upon the decision reported as *Michigan Rubber (India) Ltd. v. The State of Karnataka & Ors.* 2012 (8) SCC 216. Lastly, it was urged that the petitioners, especially Birla Ericsson cannot be heard to complain of the respondents' action because it is too in respect of Package-B, was complete – and included the scanned copy. The importance of having complied with such terms was, therefore, known to that party. Having accepted that condition, and complied with it in respect of one of the bids, Birla Ericsson could not be heard – on an application of the principle of approbate and reprobate, to complain against those terms. In support of this proposition, learned counsel relied upon the decision in *Larsen & Toubro Ltd. and Anr. v. UOI & Ors* 2011 (5) SCC 430 and *New Bihar Biri Leaves Co. and Ors. v. State of Bihar and Ors./Nathalal Doshi and Ors. v. State of Bihar and Ors.* 1981 (1) SCC 537.

Relevant tender conditions

17. Before a discussion on the rival merits of the case, it is necessary to extract a few relevant conditions contained in the Tender form. They are as follows:

“IV.A.11. The bidder must comply with all tender conditions. Clause by Clause compliance for the tender document shall be submitted by the bidder along with the No deviation certificate. Every page of the same shall be signed and written as complied against each clause. The copy of the clarifications/corrigendum shall also be submitted by the bidder duly signed on every page along with compliance against each clause.

IV.A.17. For participating in this tender online, the following

instructions are to be read carefully. These instructions are supplemented with more detailed guidelines on the relevant screens of the portal.

IV.A.23 The entire bid submission would be online on the portal (unless specified for Offline Submissions). Broad outline of submissions are as follows:

- *Submission of Bid-Parts/Envelopes*
 - *Technical-Part*
 - *Financial-Part*
- *Submission of information pertaining Bid Security/Earnest Money Deposit (EMD)*
- *Submission of digitally signed copy of Tender Documents/Addendum*
- *Submission of General Terms and Conditions (with/without deviations)*
- *Submission of Special Terms and Conditions (with/without deviations)*

*IV.A.24 **Offline Submissions:** The bidder is requested to submit the following documents offline to **General Manager (MM), Bharat Broadband Network Limited, 3rd Floor, CDOT Campus, Mandi Gaon Road, Chhatarpur, New Delhi-110030** before the last date and time of bid submission in a Sealed Envelope otherwise the bid shall not be opened:*

- 1. Original copy of the Bid Security in the form of a Bank Guarantee/Demand Draft/Bankers cheque in accordance with the details mentioned in Detailed NIT (Section-I). Separate bid security has to be submitted for each package.*
- 2. Original copy of the letter of authorization shall be indicated by written power-of-attorney.*
- 3. Demand Draft/Bankers cheque of Rs.10,500/- (including*

VAT) drawn in favour of BHARAT BROADBAND NETWORK LIMITED payable at New Delhi and drawn on any scheduled bank against payment of tender fee/Cost of Tender Documents.

IV.A.26 The Bidder should also upload the Scanned copy of all above said original documents as Bid-Annexure during Online Bid-Submission.

SECTION-VII

Price Schedule for indigenous Equipment for PACKAGE A

S I N o	Item Description	Total Quantity	Ex-factory Price (Basic Unit Price exclusive of all	Excise Duty		Sales Tax/VA T		F.F. Pkg & Insurance		Other levies & charges, if any	Unit Price (all inclusive 4+6+8+10+11)	Duties & Taxes VAT/CENVAT-able on unit price	Total Price Inclusive of all Duties, Taxes, levies & discounts	Discount Offered, if any	Total Discounted price (all inclusive) (14 + 15)	E.D. Tariff Head	Import content	Percentage (%) of Customs Duty	Customs Tariff Head
				%	Amt	%	Amt	%	Amt										
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20

1	24F Metal free Optical Fibre	71257 kms.														
2	Branch	18269														
3	Straight	18055														
4	Splitters	6919														
5	Splitt	6919														

IV.A.29 CAUTION: All bidders must fill Electronic FormsTM for each bid-part sincerely and carefully, and avoid any discrepancy between information given in the Electronic FormsTM and the corresponding Main-Bid. For transparency, the information submitted by a bidder in the Electronic FormsTM is made available to other bidders during the Online Public TOE. If it is found during the Online Public TOE that a bidder has not filled in the complete information in the Electronic FormsTM, the TOE officer may make available for downloading the

corresponding Main-Bid of that bidder at the risk of the bidder. If variation is noted between the information contained in the Electronic Forms TM and the Main-Bid, the contents of the Electronic Forms TM shall prevail. Alternatively, the purchaser reserves the right to consider the higher of the two pieces of information (e.g. price) for the purpose of short-listing, and the lower of the two pieces of information (e.g. price) for the purpose of payment in case that bidder is an awardee in that tender.

IV.A.39 For further instructions, the vendor should visit the home-page of the portal <https://www.tcil-india-electronictender.com>, and go to the User-Guidance Center.

II.21.3 Prior to the detailed evaluation pursuant to clause 22, the Purchaser will determine the substantial responsiveness of each bid to the Bid Document. For purposes of these clauses, a substantially responsive bid is one which confirms to all the terms and conditions of the Bid Documents without material deviations. The purchaser's determination of bid's responsiveness shall be based on the contents of the bid itself without recourse to extrinsic evidence.

II.14. FORMAT AND SIGNING OF BID

II.14.1 The bidder shall prepare one complete set of bid as per instructions mentioned in Section-IV-A. In the event of any discrepancy between the Electronic Forms TM and the 'Main-Bid', the contents of the Electronic Forms TM shall prevail. The copy of quality manual and Article of Memorandum of Association may be provided in the bid.

II.22. EVALUATION AND COMPARISON OF SUBSTANTIALLY RESPONSIVE BIDS

11.22.1. The Purchaser shall evaluate in detail and compare the bids previously determined to be substantially

responsive pursuant to clause 21.”

Discussion and findings

18. The NIT in this case had unequivocally expressed the intention that bids were to be accepted only in the electronic format. The NIT further stated that the fuller electronic form was to be obtained from the TCIL website. That form contained different parts, including the sections on technical and financial bids. The heart of the controversy is whether it was essential that the electronic tender form, had to necessarily contain a scanned copy of the financial bid (which the respondent says is the “main bid”- even though no such definition exists in the NIT or the form itself). The respondent further submits that omission to submit, by uploading such scanned copy, results in the non-submission of the other parts of the electronic bid. To support this argument, it relies on conditions in the tender form requiring the bidder to comply with the guidelines and instructions issued by TCIL in its website. Interestingly, Clause IV.A.26 stipulates that the copies of the tender bid security documents, i.e. the bank guarantee or Demand draft, a further demand draft for Rs. 10,500/- and another document had to be scanned and uploaded along with the form. This is evident from the express stipulation in that condition that the *“Bidder should also upload the Scanned copy of all above said original documents as Bid-Annexure during Online Bid-Submission.”* The existence of this document, in the opinion of the court, fortifies the Petitioners’ argument that the requirement of submitting a scanned copy of the financial bid was not deemed essential. Had it been given

such importance, the BBNL would have incorporated the condition itself in the tender form, instead of relying on its agencies' instructions to the tenderers which the bidders were advised to comply with (Clause IV.A.39). There is also internal indication in the form of Clause IV.A.29 to say that it was the electronic bid which BBNL had to see, and discrepancies, conflicts, (or even omissions) had to be resolved in a manner that the electronic bid prevailed:

“IV.A.29.....If it is found during the Online Public TOE that a bidder has not filled in the complete information in the Electronic Forms TM, the TOE officer may make available for downloading the corresponding Main-Bid of that bidder at the risk of the bidder. If variation is noted between the information contained in the Electronic Forms TM and the Main-Bid, the contents of the Electronic Forms TM shall prevail. Alternatively, the purchaser reserves the right to consider the higher of the two pieces of information (e.g. price) for the purpose of short-listing, and the lower of the two pieces of information (e.g. price) for the purpose of payment in case that bidder is an awardee in that tender.”

Clause II.14.1, similarly provided that:

“II.14.1 The bidder shall prepare one complete set of bid as per instructions mentioned in Section-IV-A. In the event of any discrepancy between the Electronic Forms TM and the ‘Main-Bid’, the contents of the Electronic Forms TM shall prevail...”

19. BBNL no doubt argues that every condition is necessary, especially those which have to disclose essential information and documents. The mainstay of its submission is the reliance on Clause IV.A.11 that *“The bidder must comply with all tender conditions.*

Clause by Clause compliance for the tender document shall be submitted by the bidder along with the No deviation certificate” and Clause IV.A.17, i.e that the bidder must read all the instructions carefully and follow them. Yet, the court cannot overlook the fact that if uploading of scanned copies of the financial bids were as essential as they are made out to be in these proceedings, BBNL would have provided an express clause of the kind stipulated by Clause IV.A.26.

20. The BBNL has used the expression “main bid” in some places in the tender form; yet it has not defined it. In these proceedings, however, the construction placed on the term is that it refers to the financial bid. If that be so, primacy is not accorded to its scanned copy, as is evident from a plain reading of Clauses II.14 and IV.A.29. Both accord overriding effect to the electronic form submitted by bidders.

21. As a matter of law, there can be no two opinions that tender conditions bind both the state agency which invites bids for goods and services, as well as the potential supplier of those goods and services, i.e. the tenderer/bidder. (Ref *G.J. Fernandez v. State Of Karnataka & Ors* AIR 1990 SC 958; *State of NCT of Delhi and Another v. Sanjeev @ Bittoo* (2005) 5 SCC 181. Yet, Courts have had occasion to deal with the question whether all conditions are to be strictly complied, or are there some which are merely ancilliary, and inessential and whose non-compliance cannot be reasonably considered as fatal to the tender or bid as to warrant its rejection on that score. This issue was dealt with in *Poddar Steel* squarely, where the Supreme Court held that:

“... As a matter of general proposition it cannot be held

that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case, the authority issuing the tender may be required to enforce them rigidly. In the other cases, it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases....”

A similar approach was indicated in *Indian Railway Catering and Tourism Corporation Ltd & Anr. vs. Doshion Veolia Water Solutions (P) Ltd and Ors.* 2010 (13) SCC 364; there the omission to mention the figure of excise duty in the bid was held to be not in respect of an essential condition as to warrant rejection of the tender.

22. On the facts, there can be no dispute that the BBNL had cautioned potential bidders to take adequate care, and even gone to the extent of providing training to their representatives. Yet, its excessive (one is tempted to say, obsessive) insistence on adherence to each and every condition, coupled with what appears to be a non-responsive or user unfriendly technology has led to the piquant situation that resulted in this dispute. Technology can simplify work; it can cut down delay, aid and speed communications and decision making. However, when technology results in a barrier, instead of facilitating easier access, the Courts have to be circumspect to claims about agencies' helplessness. In the present case, the successful submission

of tender for one package by Birla Ericsson, (Package B) does not mean that it did not encounter the difficulties that prevented it from uploading the scanned copies of the financial bid in respect of Packages D and F. That it could do so only means that it correctly understood and was fortunately able to upload that data; however that cannot mean that it is dissimulating or making false claims about the inability to upload the data. The logs provided by the BBNL in respect of Birla Ericsson and Vindhya Telelinks are telling. Whereas the former was able to access and lodge its financial bid (without the scanned copy) at 02.58 PM, i.e. 2 minutes before the deadline, Vindhya could do so at 02.35, i.e. 25 minutes before the deadline. The BBNL also does not dispute that apart from these two bidders, there were two others who encountered similar difficulties in uploading scanned copies of the financial bids. The Court is also mindful of the fact that the BBNL was able to comply with this court's order dated 12.06.2013 and retrieve the technical bids of these two petitioners for processing.

23. This Court is also of the opinion that the allusion to substantial responsiveness at more than one place in the tender form, while dealing with the question of further processing, brings home the contentions of the petitioners that not all conditions in the tender form and instructions in the website of TCIL were deemed essential. There is no dispute that the financial bids were in fact sought to be uploaded in time; they were in fact picked up in the server's log. Yet, the design of the form by TCIL – at the behest of BBNL was such that the absence of the scanned copy of the financial bid prevented it from

being received by the latter.

24. The result of the above discussion is that the BBNL's refusal to process the petitioners' tenders is arbitrary and unreasonable. A direction is accordingly issued to the BBNL, i.e. the respondent to forthwith take steps to decrypt the financial bids of the petitioners and such other data concerning their tenders, lying with the servers used, or hired by it (i.e. the BBNL) and proceed to process the technical and financial bids further. In case the petitioners or any of them are eligible for consideration and being involved in the further stages of tender finalization, their applications shall be proceeded with in accordance with law.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

JULY 11, 2013